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HAROLD B. WILLEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 589

V. P. SERODINO, INC.,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION.

REPLY OF APPELLANT TO MOTIONS TO AFFIRM

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Serodino respectfully urges that this Court should deny the several motions to affirm as submitted by the government, the railroads and the barge line interests. Appellees assert that the question presented is unsubstantial. Appellant submits that there is a lack of substance, not in the question presented by this appeal, but in the basis for the commission's interpretation of the statute.

We undertake to show that the involved statute expresses a simple exemption in clear and unmistakable terms. The commission's interpretation of it is based on complex and

contradictory distractions, and upon prolonged discussion of matters that are not pertinent to the law as written by Congress. This interpretation was formally approved by the court below without further illumination.

Great respect and weight are due and accorded to the commission's views. The burden of sustaining a contrary view is therefore greater than would attach to an objective discussion of the merits of the question presented. If the time and opportunity afforded by this reply are inadequate to that burden, we pray that plenary consideration be granted to the end that appellant may not be denied a perfect understanding. In so doing, we respectfully suggest that the question presented, being narrow, warrants assignment of the cause to the summary calendar.

I.

THE COMMISSION REJECTED THE WORDS OF THE STATUTE AND SUBSTITUTED THEREFOR WORDS OF A DIFFERENT MEANING.

The basic question in this case is a narrow one. Appellees agree that the case turns on the meaning of the words "transportation of commodities in bulk" as used in 49 U.S.C. 903(b)[1] (U.S. p. 2; R.R. p. 2; Barge p. 2). They

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[1]"Sec. 303(b) Nothing in this part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count. For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended."

have admitted that scrap iron and steel is a commodity but deny that it is or can be transported in bulk. (U.S. Answer par. VI; I.C.C. Answer par. V)

Appellees cannot and do not claim that the words "in bulk" or the phrase "commodities in bulk" are words of art having a precise technical meaning in a particular field.[2] Therefore, the words carry their natural and common import as familiar English words. "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607, 618 (1944).

The natural, common import of the words "in bulk" is clearly stated in Webster's New International Dictionary, where the word "bulk" receives comprehensive definition and the term "in bulk" is defined as follows:

> In a mass; not enclosed in separate packages or divided into parts; in such shape that any desired quantity may be removed; as, goods shipped or sold *in bulk.*

The commission rejected the ordinary meaning of the words used by Congress saying, "The words 'in bulk' here are not mere dictionary words, but are words long used

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[2]The commission's report writer suggested (292 I.C.C. 688) that the words "in bulk" have a special commercial meaning in the industry and cited the following cases as holding that such meaning must govern: *United States* v. *Seatrain Lines,* 329 U.S. 424; *Black* v. *Interstate Commerce Commission,* 167 F. 2d 825; and *Guyott Construction Co., Inc., Extension—Fuel Oil,* 49 M.C.C. 265. Those cases fall so far short of sustaining the proposition for which they are cited that not even the intervening appellees refer to them on motion. *cf. Suwannee Fruit & Steamship Co.* v. *Fleming,* 160 F. 2d 897 (1947).

in transportation and in the scrap industry, and moreover, have been construed by the Commission". 292 I.C.C. 688[3]

Rejecting the words of the statute, the commission substituted therefor the words "fungible" or "homogeneous". It said, "The term 'commodities in bulk' is a common one and is used in describing fungibles, which can be poured, scooped, or shoveled, and which generally are of such size that they cannot be handled piece by piece." 292 I.C.C. 688 It also conceived a "category of nonbulk commodities" which are homogeneous in nature. 292 I.C.C. 691

The motions of appellees contain only a minimum discussion of this crucial question as to what the words of the statute mean. When they do touch upon the heart of the case the arguments are divergent, and result in a failure to spell out any sound basis for the commission's interpretation of the statute. The divergence lies in the fact that, whereas the barge interests argue that bulk really means fungible or homogeneous, or both, the United States and the Interstate Commerce Commission argue that scrap cannot be in bulk in the dictionary sense of that word. (U.S. p. 7) The first argument is preposterous and the second is founded on a denial of facts which the government has admitted in its pleadings.

The contention of the barge interveners centers on a fantastic assertion to the effect that the dictionary definition of "in bulk" really indicates that the material must be interchangeable or homogeneous. (Barge, p. 10-11).

No authority is or could be cited to sustain that idea. It should suffice therefore, to observe that different words may not be gratuitously treated as synonymous. However,

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[3]Such citations are to the report of the commission, which is reprinted in appellant's jurisdictional statement with original paging preserved.

we include in Part I of the Appendix hereto a statement of all the authorities known for the meaning of the words "in bulk" as compared with the meaning of the words "fungible" and "homogeneous". They are not interdependent.

The government's contention is that the assailed rejection of the words "in bulk" is based on the false factual premise that scrap is "heaped loose" in the barges. They say, "Patently it is not and cannot be 'heaped loose' into the holds of the transporting barges." (U.S. p. 7)

But the quoted statement of the government is contrary on its face to the following admission, made by both the United States and the Interstate Commerce Commission in their answers to the complaint of Serodino: (Italics supplied)

> "Answering the allegations contained in Paragraph 3 of the Complaint, the United States admits that coal is transported by the plaintiff without wrappers or containers, *loaded loose* in open-top barges."

The government argument at this point refers to handling "piece by piece" and compression into so-called bundles which, of course, are not wrapped or contained, but comprise merely coherent masses. If that is supposed to negative the term "heaped loose", we respectfully urge that the Court examine the photographic exhibits in the record, including appellant's exhibits 27 and 28 and appellees' exhibits 5, 12 and 13. If the apparent orderly stowage illustrated in exhibit 5 is significantly different from the loose heap in exhibit 27, the significance was lost upon the commission. For the commission did not decide that scrap is exempt only when heaped loose; it denies that scrap can be transported in bulk under any circumstances. (I.C.C.

Answer, par. V; U. S. Answer, par. VI). Properly speaking, if orderly stowage negatives handling in bulk, it does so only when the stowage is orderly. Yet the commission's order did not merely deny exemption to scrap so handled; it held that scrap can never be transported in bulk, not even when it is "heaped loose", as in fact appellant transports it.

We respectfully submit that the commission really rejected the common and natural meaning of the words "in bulk" and substituted a different meaning therefor.

II.

THE ACTION OF THE COMMISSION WAS CONTRARY TO THE STATUTE.

A. The words of the statute are clear and do not permit modification by the process of administrative construction.

Appellant respectfully urges that the words used in 903(b) are clear and unambiguous and sufficient in and of themselves to determine the purpose of the legislation. In such cases this Court has followed the plain meaning of the words except where it has led to absurd or futile results. *United States* v. *Missouri P. R. Co.*, 278 U.S. 269 (1928). Also in such cases this Court will not permit references to legislative history to add or detract from the significance of the words used. And the great weight attaching to administrative construction does not apply in cases where the construction is not doubtful, nor is such administrative construction reinforced by subsequent reenactment of the statute. (278 U.S. 278-280.)

Appellees rely upon the privilege of expertise but that is limited to cases where the agency conclusions rest "squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts".

Securities & Exchange Commission v. *Chenery Corp.*, 332 U.S. 194, 209 (1947). There the commission was charged with the administrative duty to ascertain whether terms were "fair and equitable". 318 U.S. 85. Similarly, in the cases cited by appellees herein, the Interstate Commerce Commission was determining matters of "public convenience and necessity" within the special area of its administrative duties. *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1945). *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236 (1945). But in the case at bar the commission was interpreting the words of a statute and, as appellees admit, this is a question committed by law to the reviewing court. 5 U.S.C. 1009(e), (U.S. p. 7). Other cases cited by intervening appellees[4] (Barge p. 8) are not contrary to the principles enunciated in the *Missouri Pacific* case cited above. In none of those cases was controlling weight accorded to an administrative interpretation that departed from the clear and unambiguous meaning of ordinary words. For example, the *Costanzo* case involved a single, complex and ambiguous statutory sentence containing nearly 900 words, in which there was no plain indication on the face of the statute whether the limiting clause in the first seven words applied to one of eleven categories of alien for which the statute provided deportation. Resort to the legislative history was necessary to determine the meaning, and the Court therefore considered the long-standing administrative interpretation, reinforced by subsequent legislation, to be significant.

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[4] *New York, N. H. & H. R. Co.* v. *Interstate Commerce Com.*, 200 U.S. 361, 401 (1906); *Fawcus Mach. Co.* v. *United States*, 282 U.S. 375, 378 (1931); *National Labor Rel. Bd.* v. *Denver Bldg. & Const. Tr. Co.*, 341 U.S. 675, 692 (1951); and *Costanzo* v. *Tillinghast*, 287 U.S. 341, 345 (1932).

We think that the case at bar should be governed by the decision of this Court in *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607 (1944). There the administrator of the Wage and Hour Division was dealing with an exemption in the Fair Labor Standards Act in an area where he had explicit authority to define the "area of production" in which the exemption operated. The basic issue was whether the administrator could include in such definition not only spacial limits, but also a limit on the number of employees in exempted establishments. 322 U.S. 625. This Court refused to permit the administrator to enlarge the words of the statute, saying (322 U.S. 618):

> "The idea which is now sought to be read into the grant by Congress to the Administrator to define 'the area of production' beyond the plain geographic implications of that phrase is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it."

The analogy of that case to the one at bar seems clear and direct, for it may truly be said here that the idea which the commission sought to read into the words "transportation of commodities in bulk" is not so complicated, nor is English speech so poor that the Congress could not have expressed the idea by using the words "homogeneous" and "fungible".

This Court has adhered to the words of a statute as Congress wrote in *Ex Parte Collett,* 337 U.S. 55 (1949). The Court was there deciding whether venue provisions of the Judicial Code governing "any civil action" applied to actions under the Federal Employers' Liability Act. The Court said (337 U.S. 58):

> "The reach of 'any civil action' is unmistakable. The phrase is used without qualification, without hint that some should be excluded."

We think that in this case the reach of "transportation of commodities in bulk" is unmistakable. It means transportation of any commodity that is carried according to the common meaning of the word bulk. That view is reinforced by the fact that the phrase was not used without qualification, but was explicitly limited by three conditions, all of which are met by scrap iron and by appellant's transportation of it.

At this point, the railroad interveners misconstrue the position of appellant, for they argue that we rely upon the limitations in 903(b) to change or enlarge the basic exemption in the first sentence thereof. (R.R. p. 3). We do not; we agree that the first sentence of 903(b) is limited rather than defined by the rest of the paragraph. However, the position of appellees runs contrary to the truism that the expression of one thing excludes another. For when Congress limited the exemption of bulk transportation to commodities that were so transported as of June 1, 1939, and are now being transported not more than three at a time and in tows where all the vessels navigated as a unit shall be considered as one, the omission of any explicit limitation to homogeneous or fungible commodities forbids its inclusion by the process of interpretation.

The commission and the appellees read out of 903(b) all but the first 17 words in favor of an esoteric concept of the meaning of "commodities in bulk". But as Congress wrote the law, it used the words "in bulk" in the broad and only sense which those words carry, and then proceeded to place limitations upon the exemption by elaborate and careful provisions as to the conditions under which bulk carriage would be exempt.

B. The regulatory purposes of Congress do not validate the commission's interpretation of the statute.

Appellant does not urge that 903(b) should be given an interpretation in which the context and broad purposes of the statute are ignored in favor of a literal application of the words used. Instead, appellant's interpretation of the paragraph is reinforced by the context. Reference to the other exemptions contained in the section demonstrate that Congress intended the words of 903(b) to be used in their common import without gloss. The Court was considering similar context when it said, "When Congress wants to give wide discretion it uses broad language". 322 U.S. 614.

We refer particularly to the provisions of section 303(e)(2) of the Interstate Commerce Act, 49 U.S.C. 903(e)(2).[5]

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[5]"It is hereby declared to be the policy of Congress to exclude from the provisions of this part, in addition to the transportation otherwise excluded under this section, transportation by contract carriers by water which, by reason of the inherent nature of the commodities transported, their requirement of special equipment or their shipment in bulk, is not actually and substantially competitive with transportation by any common carrier subject to this part or part I or part II. Upon application of a carrier, made in such manner and form as the Commission may by regulations prescribe, the Commission shall, subject to such reasonable conditions and limitations as the Commission may prescribe, by order exempt from the provisions of this part such of the transportation engaged in by such carrier as it finds necessary to carry out the policy above declared. A carrier (other than a carrier subject, at the time this part takes effect, to the provisions of the Intercoastal Shipping Act, 1933, as amended) making such application prior to January 1, 1941, shall be exempt from the provisions of this part until a final determination has been made upon such application if such carrier or a predecessor in interest was in bona fide operation as a contract carrier by

In this paragraph, Congress clearly and explicitly authorized the commission to determine upon application whether a contract carrier should be exempted because its transportation was not competitive with common carriers by reason, among other things, of "shipment in bulk". But Congress did not provide any such discretionary authority in the commission with respect to 903(b).

The commission did not base its interpretation of 903(b) upon a supposed adherence to Congressional purpose or regulatory necessity and it explicitly disavowed reliance upon legislative history.[6]

Nevertheless, appellees would bolster the commission's interpretation by the assertion that when Congress enacted 903(b) it was thinking only of coal, grain, iron ore,

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water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, for interruptions of service over which such carrier or its predecessor in interest had no control.

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[6]The commission said 292 I.C.C. 687:

> "Considerable reliance is placed, rather, upon excerpts from the legislative history of part III of the act. However, no reference is made to any expression in any congressional committee report or to any statement made on the floor of either House of the Congress when the bills which later became part III of the act were under discussion which throws any light upon the intended meaning of the words 'in bulk' as used in section 303(b). Reference is made to a Canadian act from which it appears that iron and steel scrap and pig iron were expressly named therein in a list of commodities as 'goods in bulk.'"

limestone and other fungibles. They base that assertion upon so-called legislative history, including a reference to statements of counsel proposing the exemption. (U.S. p. 6)

Examination of their footnoted reference[7] reveals that one Gilbert L. Johnson suggested to the Senate Committee on behalf of the Lake Carriers Association an exemption provision which would have listed the commodities eligible for exemption, as follows: (p. 494 of transcript of Senate hearings)

> "Nothing in this act shall apply to the transportation in bulk (that is, not bundled or enclosed in containers) in vessels navigating the Great Lakes of ores, minerals, stone, cement, sand, gravel, coal, coke, grain, seed, flaxseed in bags, liquids, timber, lumber, pig iron, steel products, and iron and steel scrap."

In the House, Mr. Johnson argued for a similar form of exemption, as follows (pp. 1669-1688 of transcript of House hearings):

> "None of the provisions of this title shall apply to water carriers transporting goods and commodities in bulk on the Great Lakes. Goods and commodities, in bulk shall mean the following goods and commodities, not bundled or enclosed in containers: Ores, minerals, stone, cement, sand, gravel, coal, coke, grain, seed, flaxseed in bags, liquids, timber, lumber, pig iron, steel products, and iron and steel scrap."

But Mr. Johnson did not press for the entire list, and limited his testimony before the Senate Committee as follows (p. 491 of transcript of Senate hearings):

> "Please let me make a general statement here that everything I am saying is limited to this particular field of the four commodities (iron ore, grain, coal, limestone). I am not talking about the other interests. We have some people in the association who do carry

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[7] The following passages are those which the barge interests quoted to the Commission on brief.

> other commodities, but they are not asking that you give any special recognition to them. It is only with respect to these four essential commodities that we are asking you to give us special recognition."

Apparently the appellees would argue here that the failure of the lake carrier spokesman to insist upon the larger list of commodities shows that Congress included only the smaller list in the unqualified words "in bulk". Aside from the obvious *non sequitur,* the reference to such expressions as an aid to judicial construction of a statute has the appearance of "fumbling about in the ashcans of the legislative process for the shoddiest unenacted expressions of intention." 3 Van. L.R. 411. See *Shapiro* v. *United States,* 336 U.S. 1, 47 (1948) The commission's expressed view is the most charitable to its own conclusions in saying that there is nothing in the legislative history which "throws any light upon the intended meaning of the words 'in bulk' ". When that is so, the words must be taken in their common import.

Other references to legislative history (Barge p. 16) do not sustain the commission's limitation on the scope of the words "in bulk" because, as the quotation from Eastman shows, his list was prefaced by the words "such as" and was exemplary, not exclusive.

This feature of the case at bar decisively distinguishes it from *National Labor Rel. Bd.* v. *Hearst Publications,* 322 U.S. 111 (1944), and *United States* v. *American Trucking Associations,* 310 U.S. 534 (1940) on which appellees rely to sustain the unlimited power of interpretation which the commission has attempted to exercise here.

It is true that in those cases the court approved an interpretation of the word "employees" different from its ordinary or dictionary meaning. But the key to the cases

lies in the consideration which the Court gave to the broad purposes and clear intent of the statutes as a whole.

In *American Trucking Association,* the court held that the power of the Interstate Commerce Commission to prescribe maximum hours of service was limited to employees affecting safety of operations, one of the principal aims of the legislation. Similarly, in the *Hearst* case, the Court held that the word "employees" was not limited to its common law meaning, but included employees in a broad sense dictated by the purpose of the Wagner Act to treat labor relations on a broad, national scale. Compare *Packard Motor Co.* v. *National Lab. Rel. Bd.,* 330 U.S. 485 (1947), wherein the Court adhered to the literal meaning of the word "employees", and the division in the Court appears to have centered upon differences as to the Congressional purpose.

Finally, it should be emphasized that appellees rely upon these cases in support of summary motions to affirm. Yet in the cited cases, and notwithstanding the weight which the Court gave to administrative determination, the Court actually gave plenary consideration to the questions presented and made an independent determination of the meaning of the statutory words used. To extend the precedent there established to the extreme of summarily disposing of this appeal, would be to abdicate the office of judicial review. This is particularly so in view of the failure of the court below to explicate its decision dismissing the complaint.

C. The commission's interpretation of 903(b) is not a valid, long-standing administrative construction.

Appellees represent that the commission's interpretation of 903(b) is sustained by a long-existing administrative construction. (U.S. p. 4-5; Barge p. 7-9; 12-14). They

reflect expressions of the commission in its report of the case. 292 I.C.C. 688. But this is mere pretense to bolster a re-writing of the statute, as is manifested by the commission's own characterization of the case, 292 I.C.C. 682:

> "A cease and desist order against the defendants is sought. The principal objective of the complainants, however, is an authoritative determination as to whether transportation of scrap iron is or is not within the exemption provisions of section 303(b) of the act."

If the pretended long-standing construction of 903(b) really existed, nothing the commission could do would make it more "authoritative", and the "principal objective of the complainants" would have been merely to stop defendant (appellant) by a cease and desist order.

The truth is that in the case at bar the commission officially adopted for the first time a mere dictum of its Division 4 in *Mulqueen Contract Carrier Application,* 250 I.C.C. 436 (1942). Never before had the *Mulqueen* concept been established as a binding interpretation of the law. Nor was it dignified or reinforced by the citations to other reports as set forth in Appendix B of the commission's report in the case at bar. (292 I.C.C. 693) and as enlarged in the footnotes of the motion for the barge line interests. (Barge, p. 12, 13).

We would not labor the point [8] in view of this Court's

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[8]In view of the insistence of appellees upon the existence of long-standing administrative construction, we show in Part II of the Appendix, by way of example only, that not only is the contention inapplicable because of the plain terms of the statute, but it is based upon factual illusion. For purposes of such example, we assume that the cases in which the commission is supposed to have held a commodity to be non-bulk, are the most significant.

holding that administrative construction will not validate a departure from the clear and unambiguous words of a statute. (278 U.S. 269). This principle is being consistently followed by the lower courts in cases involving misinterpretation by the Interstate Commerce Commission of exemption provisions of the Interstate Commerce Act, cases which do not even reach this Court.

The commission decided that redried tobacco was not an agricultural commodity so as to be exempt under 49 U.S.C. 303(b)(6). But a district court in Kentucky concluded that the commission was wrong and made an independent determination that the material was exempt. *Interstate Commerce Commission* v. *Yeary Transfer Co., Inc.,* 104 F. Supp. 245 (D.C., E.D., Ky., 1952). The first conclusion of law adopted by the Court in that case was as follows:

> "1. The rule of strict construction of exemptions upon which plaintiff relies should not be applied to the extent of requiring a result contrary to the clear intent of the law. Neither should the rule attributing great weight to contemporaneous administrative rulings be applied to require the Court to follow such rulings when they are found to be clearly wrong. *Interstate Commerce Commission* v. *Service Trucking Co.*, 3 Cir., 186 F. 2d 400; *Interstate Commerce Commission* v. *Love*, D.C., 77 F. Supp. 63, affirmed, 5 Cir., 172 F. 2d 224."

In the *Love* case, the commission had taken the position that headless shrimp packed in ice were not an agricultural commodity so as to be exempt; the court decided otherwise. *Interstate Commerce Commission* v. *Love* 77 F. Supp. 63 (D.C., E.D., La., 1948). The Court said:

> "One of the cardinal rules of interpretation is that the meaning of a statute is to be ascertained from the *words used* and the subject matter to which they relate. The words used are to be taken in their usual and popular sense, except where they are technical, and then according to the acceptation of those learned in the art. (Italics used by the court.)"

In *Interstate Commerce Comm'n* v. *Service Trucking Co.*, 186 F. 2d 400 (C.A. 3rd, 1951), the commission had decided that crated eggs in the shell were not an agricultural commodity; the court decided otherwise, saying, in the words of a quoted opinion:

> "... where the question is one not wholly dependent upon matters within the expert, technical or statistical field in which the regulatory body is preeminently qualified to judge, but which primarily involves jurisdiction the force of the administrative rulings is less than it would otherwise be."

Interstate Commerce Commission v. *Allen E. Kroblin, Inc.*, 113 F. Supp. 599 (N.D., Iowa, 1953); Aff. 212 F. 2d 555 (C.A. 8th, 1954); cert den. 348 U.S. 836, is the most recent case in which the courts have passed upon the extent of exemptions in the Interstate Commerce Act. There the commission held that dressed and eviscerated poultry were not agricultural commodities; the court decided the commission position was contrary to law and refused to compel the defendant to stop transporting the commodities without a certificate from the commission.

These were cases in which the commission went into court as a plaintiff to enforce the statute as the commission understood it. However, we know of no principle by which the courts should give the commission greater standing here as a defendant than it had in those cases as a plaintiff. The quoted finding from *Yeary* indicates that full weight was given there to the principle of expertise.

D. No custom of the trade validates the commission's interpretation of 903(b).

Appellees urge that the commission's interpretation of the words "in bulk" is reinforced by long acceptance and conformity in the water-carrier industry. (Barge p. 8) This is coupled with repeated assertions that Serodino

alone transports scrap as an exempt commodity. (U.S. p. 4, 7; Barge p. 4, 8) The argument becomes full blown in the extreme statement of the barge interests that this appeal is unsubstantial because appellant's co-defendant did not contest the decision and four non-regulated carriers that intervened before the commission are not appearing by name in this Court. (Barge p. 6) Of course appellant's standing in this Court does not depend upon the number of parties on a side.

As for the custom in the trade, that was the sole basis for the commission's view that the words of the statute are open to construction. 292 I.C.C. 688.[9]

A substantial answer to this is that the reference in 903(b) to the "existing custom of the trade" does not lay open to construction the words "commodities in bulk" because it does not apply thereto. The statute says:

> "This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count."

Grammatically, the parenthetical phrase modifies the verbs, "are loaded and carried and received and delivered". It does not modify the subject, "commodities in bulk".

Anyway, there was no contrary custom in the trade with respect to whether or not scrap was handled in bulk, *i.e.*, heaped loose in a barge. As to that the Commission admitted there had been no deviation. 292 I.C.C. 683 The custom in the trade on which appellees rely was developed since regulation took effect and was to treat all commodities as non-exempt, whether handled in bulk or not. 292 I.C.C. 684

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[9]Except see footnote 2, p. 3.

III.

FACTS CONCERNING CONSIST OF SCRAP ARE NOT PERTINENT TO A DETERMINATION WHETHER THE TRANSPORTATION IS "IN BULK".

Appellees would parry the thrust of the statutory meaning with a many-pronged argument about the physical characteristics of scrap. While granting only the most scanty attention to the crucial and incisive meaning of the words "in bulk", and apparently recognizing the futility of sustaining the necessary substitution of words, they resort to a prolonged and repetitive discussion of the consist, grading, form and nature of the commodity. The unique character of scrap iron and steel (which is a conglomeration of material that comprised an infinite variety of identifiable articles before they were discarded and became scrap) is perfectly adaptable to appellees' legerdemain. But there is no factual bug under the chip of the law.

A revealing twist is apparent in the motion of the barge interests (p. 10-11) where they argue that "all must be the same commodity" to be exempt, and then point to the fact that scrap includes various discarded articles, even locomotive wheels and axles, motor blocks, etc. But these curious facts are not pertinent to the argument because appellees have admitted that "scrap is a commodity" (U.S. Answer, par. VI; I.C.C. Answer, par. V).

Repeated references to grading of scrap and the "scrambling of separately valued lots" is merely another attempt to evade the admission that scrap is a commodity. (Barge p. 5; U.S. p. 4).

A perfect understanding is aided by considering the commission's Administrative Ruling No. 1 (water carriers) as follows:

> "*Question*: What constitutes a 'commodity' as the word is used in section 303(b) and (c)?
>
> *Answer*: The term "commodity" as used in these subsections means an article of commerce described by the most specific and least inclusive commodity name (not trade name, grade, or generic term) properly and customarily applied to the article. For example "grain" is not a commodity inasmuch as the individual kinds of grain are properly and customarily described by the more specific and less inclusive names, *viz.*, 'wheat', 'oats', 'corn', 'barley'.

If the facts advanced by appellees have any significance, it tends only to suggest that scrap iron and steel, like grain, is not a commodity because it consists of individual kinds, such as scrap rails or scrap borings or otherwise. But that was not the basis for the commission's decision. It admits that scrap is a commodity and if the admission could be retracted, the statute would only allow a determination as to what are the commodities within the generic term. Incidentally, the commission's treatment of grain, as to which no attempt has been made to deny its eligibility to exemption, did not go so far as to break down wheat into separately valued units such as winter wheat and spring wheat, or corn into No. 2 yellow corn or No. 1 white corn.

Other facts reiterated by appellees are not only irrelevant to handling "in bulk", but wholly fail to distinguish scrap according to the commission's test of susceptibility to handling "piece by piece" as contrasted with the concept of "scoop, shovel and pour". Wide variation in shape and size is merely a matter of scale. A steel boring is not more or less susceptible to handling piece by piece than is a grain of wheat. By the same token, a chunk of iron that

measures 36″ in the cube is not more or less susceptible to being scooped, shoveled or poured than is a chunk of iron ore of the same size. The commission's report recognizes this and is constrained to admit that a bargeload of borings would therefore qualify as a commodity in bulk. 292 I.C.C. 685 It does not avoid the controlling significance of that admission to characterize the example as "extreme", because the logic extends from one extreme to the other, and the commission's decision adopted the extreme view that scrap can never be transported in bulk.

CONCLUSION.

We respectfully submit that the question presented in this case is so narrow that its determination should not have required an appeal to this Court. We think the error of the commission and of the court below is palpable and suggest that the possibility of perpetuating such an error attaches far greater importance to this appeal than would the economic question as to whether scrap may be hauled in unregulated water transportation. In these circumstances, appellant respectfully prays that this Court deny the motions to affirm and that this appeal should not be disposed of summarily or without that full explication which the court below failed to undertake.

Respectfully submitted,

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APPENDIX.

PART I.

Meaning of the term "commodities in bulk".

The natural and common import of the words "in bulk" is clearly stated in Webster's New International Dictionary, where the word "bulk" receives comprehensive definition and the term "in bulk" is defined as follows:

> "In a mass; not enclosed in separate packages or divided into parts; in such shape that any desired quantity may be removed; as, goods shipped or sold *in bulk.*"

Other standard dictionaries and legal authorities concur in the Webster definition. The New Century Dictionary says:

> "Bulk [bulk, n. ME bolke, heap; prob. from Scand. (*cf.* Icel. *bulki,* heap, cargo.)] A heap or pile; cargo, etc., lying loose, and not inclosed in bags, boxes, etc.; also, the body or mass of anything; etc."

Black's Law Dictionary shows that in law the term "in bulk" has a similar meaning to that accorded by the foregoing standard dictionaries:

> "IN BULK. As a whole; as an entirety, without division into items or physical separation in packages or parcels. *Standard Oil Co.* v. *Com.,* 119 Ky. 75, 82 S.W. 1022; *Fitz Henry* v. *Munter,* 33 Wash. 629, 74 P. 1003; *State* v. *Smith,* 114 Mo. 180, 21 S.W. 493; *Feldstein* v. *Fusco,* 205 App. Div. 806, 201 N.Y.S. 4, 5; *Marlow* v. *Ringer,* 79 W. Va. 568, 91 S.E. 386, 388, L.R.A. 1917D, 619; *Mott* v. *Reeves,* 125 Misc. 511, 211 N.Y.S. 375, 380; *Fiske Rubber Co.* v. *Hayes Motor Car Co.,* 131 Ark. 248, 199 S.W. 96; *In re Lipman* (D.C.) 201 F. 169, 173."

Standard Oil Co. v. *Commonwealth,* 82 S.W. 1022, 119 Ky. 75, is typical of the cases cited in Black's Law Dictionary. The court there said:

> "The term 'in bulk' has long been understood in commercial circles as contradistinguished from 'package' or 'parcel,' as where wheat, lard and the like are sold in bulk. The common and approved usage of language, the technical meaning given by the business world, and the legal definition of the expression 'in bulk' are opposed to the idea of a number of packages, parcels, or bbls. containing merchandise being regarded as being in bulk".

At the time when the statute was enacted, on September 18, 1940, the Commission held to the same construction of the words "in bulk." In Administrative Ruling No. 2 of February 20, 1941, the Commission said:

> "A commodity in bulk is one that is not sacked, boxed, bundled or otherwise assembled, but is carried loose and is transported in the vessel without stowage except necessary separation or necessary trimming or securing to promote the safety of the vessel and cargo."

This ruling applied the test long ago expressed by the Commission in *Wholesale Fruit & Prod. Assn.* v. *A.T. & S.F. Ry.,* 14 I.C.C. 410:

> "Bulk freight, as the term is used in classifications, means freight which is loose and not put up or contained in any package. * * * The definition of bulk freight as insisted upon by the complainant is freight which is loose and not put up or contained in any package. Apples thrown into a car would be bulk freight; contained in barrels they would be package freight. The carriers generally provide in their classifications that bulk freight will not be received in less than carload lots and as used in that rule the above definition of the word bulk is probably the correct one."

See also the following statements by the Commission:

"The term 'in bulk' commonly refers to a loose mass which is poured or thrown into a vessel or vehicle without regard to order, and which is restrained during transportation only by the bottom and sides of the carrying vessel and its bulkheads. Commodities which are stowed in an orderly arrangement are not commodities in bulk. * * * *John L. Goss Corp.*, 250 I.C.C. 101-103. (1941)

"Our investigation of applicant's operations shows that, since the beginning of 1939, he has been engaged in the towage of barges loaded with commodities in bulk, consisting of sand, gravel, coke, coal, *scrap iron*, acid, and gasoline. At no time have more than three commodities been transported in the same vessel or tow. Such transportation by applicant is not subject to Part II of the Act, because Section 303(b) provides that nothing in that part shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel (or two or more vessels while navigated as a unit) in which such commodities are transported is being used for the carrying of not more than three such commodities."

Ralph Raike Applications, 250 I.C.C. 177 (1942).

NOTE: In its Ruling No. 2 and in Goss the commission appears to have attached significance to the matter of orderly stowage. Whether or not this constituted a departure from the common import of the words "in bulk" is beside the point in this case because orderly stowage was not the test applied to scrap iron, although it was applied to pipe and to cut stone. (Barge p. 9)

fungible.

Webster's New International Dictionary defines the word "fungible" as follows:

"adj. 1. *Law.* Of such a kind or nature that one specimen or part may be used in place of another specimen or equal part in the satisfaction of an obligation;—

applied, in the Civil law and various Civil-law systems, and in jurisprudence, to things that in general are estimated in number, weight, or measure, and cannot be used except by permanently appropriating them. 2. Interchangeable; capable of mutual substitution.

n.; usually in pl. [ML. (res) *fungibles*, fr. L. *fungi* to discharge. 'Called *fungibles, quia una alterius vice fungitur.' John Taylor* (1755). See FUNCTION.] A thing that is fungible; specif., *Law*, a thing of a class or kind such that one individual or part may be used in place of any other individual or equal part in satisfaction of an obligation. The classification is important with reference to the rights of the borrower in the contract of mutuum (which see), the usufructuary of goods that perish or are alienated in the using, etc."

homogeneous.

Webster's New International Dictionary defines the word "homogeneous" as follows:

"adj. [ML. *homogeneus*, fr. Gr. *homogenes*, fr. *homos* the same + *genos* race, kind. See SAME; GENUS.] 1. Of the same kind or nature; consisting of similar parts, or of elements of the like nature;—opposed to *heterogeneous;* as *homogeneous* particles, elements, or principles."

PART II.

Administrative Construction Does Not Support Mulqueen Doctrine.

The first case where the commission decided that a commodity was not exempt under 903 is *Foreman-Gregory Co.—Exemption, Section* 303(e), 250 I.C.C. 51 (1941). In that case, the commission held that lumber was not exempt, but the decision was under Section 303(e) [49 U.S.C. 903(e)] which we have quoted above and which expressly gives the commission discretionary authority to decide what shall be exempt under that section. The commission did say in passing that lumber was not exempt

under Section 303(b) [49 U.S.C. 903(b)], but there was a sound basis for such holding, and without need to resort to a distortion of the words of the statute. In that case the commission noted, page 51, that "the lumber is carried without mark or count, applicant accepting shipper's count, without making any tally." Elsewhere, and throughout the decision, the commission refers to quantities of lumber in thousands of feet. This makes plain that in the case of lumber there is a transportation count, it being immaterial whether such count is by the carrier or the shipper, so far as the language of 903(b) is concerned.

The same comment is warranted in connection with the commission's next decision holding logs and piling to be non-exempt. *Towage of Floating Objects (Logs and Piling in Rafts)*, 250 I.C.C. 525 (1942). Like lumber, this report shows that logs and piling are subject to transportation count or measurement in feet. The decision in the case was under 903(e) and the reference to logs and piling as not bulk commodities was incidental. This is another correct decision for a wrong reason.

G. B. Zigler Co., Contract Carrier Application, 265 I.C.C. 404 (1948), was not a decision under 903(b), but was a franchise case in which the commission merely recited that the applicant had hauled commodities "other than in bulk," enumerating oil field machinery, tank steel, steel pipe, oil drilling rigs, logs, cattle, rice in sacks, sugar cane, sugar in bags, oil tanks, piling, and engine and oil-well casing. This case has nothing to do with the commission's interpretation of 903(b) and it may be assumed as a matter of common knowledge that such items as oil field machinery, rice in sacks, etc., were either subject to transportation mark or count, or were put in wrappers or containers Clearly, the determination as to any of those would be that it failed to conform to the one of the stated conditions in the exempting statute.

The case cited by the commission as holding that brick is a non-bulk commodity is *Callanan Road Improvement Co. Extension—Towage,* 285 I.C.C. 137 (1952). That was a franchise case that did not even mention 903(b) and contains no discussion of whether or not brick is exempt. Apparently, it holds inferentially that brick is non-exempt, because the commission granted franchise authority to the applicant carrier. In any event, the report shows that brick is sold and handled on a per thousand basis, which constitutes a transportation count and affords sound basis for non-exemption under the express terms of the statute, whether or not the transportation is "in bulk."

The remaining commission cases under 903(b) are the so-called *Mulqueen* line of cases which have never been reviewed and which constitute the entire weight of commission authority for the erroneous interpretation of the statute here under attack. *Mulqueen Contract Carrier Application,* 250 I.C.C. 436 (1942); *Columbia Transp. Co., Contract Carrier Application,* 250 I.C.C. 653 (1943).